Supreme Court, U.S.
FILED
JUN 17 1997
CLERK

No. 96-1797

In The Supreme Court Of The United States

OCTOBER TERM 1996

ROBERT C. HENSON,

Petitioner,

v.

THE CITY OF GREENSBORO, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARTIN N. ERWIN
Counsel of Record for Respondent
SMITH HELMS MULLISS & MOORE, L.L.P.
300 N. Greene Street, Suite 1400
Greensboro, North Carolina 27401
(910) 378-5327

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

10 pp

TABLE OF CONTENTS

Statement of the Case 2

Argument 3

Conclusion 5

Appendix 6

TABLE OF AUTHORITIES

Cases

Doe University of Maryland Medical System Corp.,
50 F.3d 1261, 1264-66 (4th Cir. 1995) 4

Martinson v. Kinney Shoe Corp.,
104 F.3d 683, 687 (4th Cir. 1997),
citing, Myers v. Hose, 50 F.3d 278,
281-82 (4th Cir. 1995) 4

Norfolk and Western Ry. CO. v. Director, OWCP,
5 F.3d 777, 779 (4th Cir. 1993) 4

Other Authorities

Rule 10(a) - Rules of the Supreme Court 3

Local Rule 36(b) and (c) - Rules of the
Fourth Circuit 3

No. 96-1797

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ROBERT C. HENSON,
Petitioner,
v.

THE CITY OF GREENSBORO, NORTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of a decision of the United States Court of Appeals for the Fourth Circuit which affirmed a decision of the United States District Court for the Middle District of North Carolina granting summary

judgment for the respondent-defendant. The opinion of the District Court has not been published and is reproduced at page A-1 of the Petition. The unpublished opinion of the Court of Appeals is reproduced at page A-8 of the Petition.

STATEMENT OF THE CASE

The essential facts of this case, as recited by the District Court, are that the plaintiff was injured in an automobile accident unrelated to his work and was unable to work in any capacity at the time his employment was terminated after an absence of five months. Based on these facts, the District Court held that the plaintiff-petitioner was not a qualified individual with a disability because he could not perform the functions of his job with or without reasonable accommodation. Petition at page A-6-7. The Fourth Circuit affirmed in an unpublished, *per curiam* opinion. Petition at page A-8.

ARGUMENT

The holding below is not "a decision in conflict with the decision of another United States court of appeals on the same important matter" within the meaning of Rule 10(a) of the Rules of the Supreme Court. To the contrary, the case is a routine, unpublished, *per curiam* opinion that is not a binding precedent under Local Rule 36(b) and (c), as shown on the face of the opinion. Petition at page A-9. Local Rule 36(b) and (c) is reproduced in the Appendix to this Brief in Opposition.

In addition, the rule in the Fourth Circuit is that a determination of whether the individual could perform with reasonable accommodation is required in each case, the very rule for which the petitioner contends. As it was most recently pronounced, the rule is as follows: "Even if a person is unable to perform the essential functions of the job in question, a 'court must nevertheless determine whether the

person could do the job with reasonable accommodation.'" *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 687 (4th Cir. 1997), *citing, Myers v. Hose*, 50 F.3d 278, 281-82 (4th Cir. 1995), and *Doe University of Maryland Medical System Corp.*, 50 F.3d 1261, 1264-66 (4th Cir. 1995).

The rule as it was announced in *Martinson, Myers* and *Doe* is precisely the rule applied in the cases from other circuits that are cited in the Petition, and the rule could not be changed by the Fourth Circuit panel that heard this case even if the decision below were published. *Norfolk and Western Ry.Co. v. Director, OWCP*, 5 F.3d 777, 779 (4th Cir. 1993) (a panel of the court of appeals may not overrule another panel's decision). Clearly, an unpublished decision with no binding effect as precedent did not overrule the published opinions in *Martinson, Myers* and *Doe*.

CONCLUSION

For these reasons, the Respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

MARTIN N. ERWIN
Counsel of Record for Respondent
SMITH HELMS MULLISS & MOORE, L.L.P.
300 N. Greene Street, Suite 1400
Greensboro, North Carolina 27401
Telephone: (910) 378-5327

APPENDIX

Local Rule 36(b) and (c) provides as follows:

[36(b)] Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published and certain unpublished opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. All opinions are available on ABBS, the Appellate Bulletin Board System, for a minimum of six months after issuance. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

[36(c)] In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral

arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28 (b).